STATE OF MICHIGAN

COURT OF APPEALS

FRANK GJOKAJ,

Plaintiff-Appellant,

v

DEAN BRIAN SCOTT,

Defendant-Appellee.

UNPUBLISHED
July 19, 2007

No. 270270
Oakland Circuit Court
LC No. 05-064210-NI

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

In this action to recover noneconomic damages and lost wages under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals by leave granted the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that the trial court abused its discretion in denying his motion for reconsideration and thereby rejecting consideration of Dr. Vittorio Morreale's affidavit submitted in conjunction with the motion.[2] We disagree.

Relief under MCR 2.119(F)(3) is appropriate where the moving party demonstrates "a palpable error by which the court and the parties have been misled and show[s] that a different disposition of the motion must result from correction of the error." However, although a trial

[1] The court subsequently granted in part plaintiff's motion for reconsideration with respect to the claim for lost wages. That claim is not at issue in this appeal.

[2] Plaintiff recognizes that this Court will not consider Dr. Morreale's affidavit in an analysis of the trial court's decision to grant summary disposition. In ruling on a motion for summary disposition, the court considers only the evidence then available, and reviewing the grant of summary disposition, this Court also considers only the evidence before the trial court at the time of its ruling. See *Maiden v Rozwood,* 461 Mich 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co,* 451 Mich 358, 366, n 5; 547 NW2d 314 (1996). However, plaintiff maintains that he is challenging the order denying reconsideration and not the order granting summary disposition.

court has considerable discretion in deciding a motion, this Court "can find no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued." *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000), citing *Charbeneau v Wayne Co Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Plaintiff contends that he could not have presented Dr. Morreale's affidavit before the court entered the March 9, 2006, order because plaintiff's appointment for the examination by Dr. Morreale was not scheduled until March 10, 2006. However, plaintiff's delay in obtaining the examination is not a basis for concluding that he could not have presented the affidavit earlier. The accident occurred on November 9, 2004. Plaintiff filed this action on January 20, 2005. Defendant filed his motion for summary disposition on January 20, 2006, which was the same day that discovery ended. Plaintiff filed his response on February 16, 2006 and did not mention a referral or a pending appointment with any physicians. Although plaintiff disclosed the appointment with Dr. Morreale on March 3, 2006 in his supplemental response, he did not request that the court adjourn the hearing. At the hearing on the motion, plaintiff's counsel advised the court that Dr. Carl "recently referred" plaintiff to Dr. Morreale, but again, did not request that the court delay its ruling. Under these circumstances, we conclude that the mere fact that the examination had not yet occurred does not suffice to show that Dr. Morreale's affidavit could not have been presented at the time of plaintiff's response. Rather, the record demonstrates more than sufficient time and opportunity to have obtained the affidavit and brought it to the attention of the trial court before the hearing. The trial court did not abuse its discretion in denying plaintiff's motion for reconsideration

Plaintiff also contends that the trial court failed to make the requisite findings under *Kreiner*, and asks this Court to reverse the order granting summary disposition and remand for proper findings. Although plaintiff's argument finds support in some published decisions issued before *Kreiner*,[3] the *Kreiner* Court's application of its ruling undermines plaintiff's position. Rather than remand for factual findings in light of its legal analysis, the *Kreiner* Court instead engaged in a full examination of the evidence in accordance with the legal analysis it provided. This approach is consistent with an appellate court's de novo review of a motion for summary disposition. *Kern v Blethen-Coluni*, 240 Mich App 333, 344 n 3; 612 NW2d 838 (2000). Accordingly, we are not persuaded that remand is warranted.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[3] See *May v Sommerfield*, 239 Mich App 197; 607 NW2d 422 (1999), and *Churchman, supra* at 232.